91-2076

Supreme Court, U.S.
FILED
AUG 4 1992
OFFICE OF THE CLERK

No. 91-2097

In The

Supreme Court of the United States

October Term, 1992

SHIRLEY CLARK,

Petitioner,

v.

HAAS GROUP, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

CLAY C. LONG
(Counsel of Record)
JAMES J. THOMAS II
DAVID L. BALSER

LONG, ALDRIDGE & NORMAN
1500 Marquis Two Tower
285 Peachtree Center
Avenue, N.E.
Atlanta, Georgia 30303-1257
(404) 527-4000

Attorneys for Respondent

August 4, 1992

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

No. 91-2097

In The

Supreme Court of the United States

October Term, 1992

SHIRLEY CLARK,

Petitioner,

v.

HAAS GROUP, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

On July 24, 1992, Respondent Haas Group, Inc. ("HGI") filed its Brief in Opposition to Petition for Writ of Certiorari (the "Brief in Opposition"). On July 31, 1992, counsel for HGI received via telecopy a letter from Petitioner's counsel questioning three factual statements made by HGI in its Brief in Opposition regarding the state of the record. HGI files this Supplemental Brief in

Opposition to clarify the statements with which Petitioner has taken issue so that this Court has a clear understanding of the state of the record below.

The statements in HGI's Brief in Opposition to which Petitioner's counsel has objected and which HGI would like to clarify are as follows:

1. "Petitioner simply failed to introduce the evidence [of intent regarding the settlement agreement] in the District Court." (Brief in Opposition, at 7).

2. "[T]here was no evidence properly before the District Court or the Tenth Circuit regarding the parties' intent with respect to the settlement agreement that led to the dismissal of *Clark I*." (Brief in Opposition, at 11).

3. "Petitioner provided no evidence to the district court of her intent regarding the settlement agreement." (Brief in Opposition, at 12).

Petitioner's counsel has pointed out to counsel for HGI that in support of her brief in opposition to HGI's motion for summary judgment on res judicata grounds, Petitioner attached the Affidavit of Barry D. Roseman, Petitioner's lawyer in *Clark I*. A copy of the Affidavit of Bary D. Roseman (the "Roseman Affidavit"), which was never separately filed in the District Court and which does not appear on the docket sheet of the District Court, is set forth at pages App. 1-App. 3 of the Appendix to this supplemental Brief.

The Roseman Affidavit is not competent evidence, should not have been considered by the District Court, and was properly ignored by the Court of Appeals. The

Roseman Affidavit was offered by Petitioner in opposition to HGI's summary judgment motion. Federal Rule of Civil Procedure 56(e) governs the form of affidavits offered in connection with summary judgment motions and states in relevant part:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

The Roseman Affidavit fails to even approach the minimum requirements set forth in Federal Rule of Civil Procedure 56(e) governing the use of affidavits in the summary judgment context. The Roseman Affidavit is nothing more than a self-serving stream of pure hearsay, double-hearsay, and triple-hearsay that fails to "set forth such facts as would be admissible in evidence." Mr. Roseman attempted through his affidavit to tell the trial court what he believed he remembered the settlement agreement said. Besides constituting inadmissible hearsay, the Roseman Affidavit does not reach the level of "evidence" because the documents referred to and described in the Roseman affidavit are not "attached thereto" and were not "served therewith" as required by Rule 56(e).

Thus, HGI's statements regarding Petitioner's failure to provide evidence regarding the settlement agreement

should be understood by this Court to mean that Petitioner failed to offer any competent or admissible evidence before the District Court regarding the settlement agreement.

CONCLUSION

For these reasons, and for the *numerous additional and independently sufficient reasons* set forth in HGI's Brief in Opposition, the petition for writ of certiorari should be denied.

Respectfully submitted,

CLAY C. LONG
JAMES J. THOMAS II
DAVID L. BALSER

LONG, ALDRIDGE & NORMAN
1500 Marquis Two Tower
285 Peachtree Center Avenue, N.E.
Atlanta, Georgia 30303-1257

Attorneys for Respondent

Attachment 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civ.: Action No. 88 Z 1789

SHIRLEY J. CLARK,

Plaintiff,

v.

HAAS PUBLISHING COMPANY, a Georgia corporation,

Defendant.

AFFIDAVIT OF BARRY D. ROSEMAN

CITY AND COUNTY OF DENVER)
) ss.
STATE OF COLORADO)

BARRY D. ROSEMAN, being first duly sworn, deposes and states as follows:

1. I was the attorney for Shirley J. Clark in a case she brought against Haas Publishing Company in this Court, *Clark v. Haas Publishing Co.*, Civil Action No. 87 F 722.

2. The only claim I made in that case on behalf of my client was that the defendant had violated the Fair Labor Standards Act by failing to pay her overtime compensation for work she had done for that company. No other substantive claim was brought in that case and, in

particular, my client did not include in that case any claim that the defendant had terminated her employment in violation of Title VII of the Civil Rights Act of 1964, in violation of the Age Discrimination in Employment Act of 1967, or in violation of her other legal rights.

3. That case was settled, and my client signed the Settlement Agreement on July 18, 1988. That Settlement Agreement explicitly provides that my client released and discharged the defendant only from any claim for unpaid overtime compensation or minimum wages under the Fair Labor Standards Act or any Colorado state statute.

4. I have reviewed a copy of this Settlement Agreement provided to me by Ms. Clark's attorney in this case. My own file for the overtime-compensation case is in storage. Last month, when I moved my offices, I moved the box containing that file, along with dozens of other boxes containing other closed-case files, to a self-storage facility located in Adams County. I have not been able to locate my file in the earlier case yet, since I pulled a muscle in my back while I was trying to sort out those closed-case file boxes on Sunday, March 12, 1989.

5. Randall W. B. Purvis, the attorney for the defendant in Ms. Clark's earlier overtime-compensation case against Haas Publishing Company, prepared the first draft of the settlement agreement in that case. I recall that his draft of that agreement recited that my client released and discharged Haas Publishing Company from all claims she had or might have against it "from the beginning of the world" to the date of her signature on that document. I recall objecting to this language, and recall informing Mr. Purvis that my client would release Haas

Publishing Company only from any claims for unpaid overtime-compensation or minimum wages. I recall that he agreed to modify the settlement agreement to limit its scope only to that category of claims.

6. My secretary typed the Settlement Agreement that was signed by Ms. Clark; Robert C. Metz, President of Haas Publishing Company; Mr. Purvis; and me. This document contains our agreement as to the limited scope of the release my client provided to the defendant.

FURTHER Affiant sayeth not.

/s/ Barry D. Roseman
BARRY D. ROSEMAN

The above and foregoing Affidavit of Barry D. Roseman was subscribed and sworn to before me on the twenty-fourth day of March, 1989.

/s/ Illegible
Notary Public

Witness my hand and notarial seal.

My commission expires 22 September 1992.